Petition

81-1186

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NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SUE GREER,
Petitioner

v.

THE CITY OF SEGUIN, TEXAS,
SOUTHWESTERN BELL TELEPHONE COMPANY
and
THE STATE OF TEXAS,
Respondents

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the Supreme Court of Texas not to review the judgment of the lower court is a decision of the highest court of the State against a right specially set up or claimed under the United States Constitution.

2. Whether there is a conflict between the proceedings of the State courts and petitioner's rights to federal due process in the State's exercise of its eminent domain powers.

LIST OF PARTIES

1. Sue Greer, Petitioner
2. The City of Seguin, Texas, Respondent
3. Southwestern Bell Telephone Company, Respondent
4. The State of Texas, Respondent

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OPINIONS OF THE COURTS BELOW

The only written opinion, that of the Court of Appeals for the Eleventh Supreme Judicial District of Texas, was ordered not to be published. (See Appendix) The overruling of the motion for rehearing in the Supreme Court of Texas is unofficially published in Vol. 24 No. 45, The

Texas Supreme Court Journal, page 567 (September 26, 1981).

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

In cause No. 74-250 a final judgment was entered against the Petitioner on October 3, 1979 in the 125th Judicial District Court of Guadalupe County, Texas. Petitioner [Mrs. Greer] perfected her appeal to the Court of Appeals for the Fourth Supreme Judicial District of Texas. In the Court of Appeals for the Eleventh Supreme Judicial District of Texas [presiding by designation of the Supreme Court of Texas] this cause, No. 5575, Styled *Sue Greer vs. The State of Texas, Southwestern Bell Telephone Company and the City of Seguin,* was affirmed on March 19, 1981 without published opinion. Petitioner filed an application for writ of error in the Supreme Court of Texas, in which that court ruled "refused, No reversible error." Petitioner filed her motion for rehearing which was denied on September 23, 1981. By this ruling the Supreme Court under Texas law does not adopt the decision of the Court of Appeals, but the Court of Appeals decision becomes final. *Dallas v. Dixon*, 365 S.W.2d 919, 922 (Tex. 1963).

This case involves an individual land owner's right guaranteed under the federal constitution to due process in the taking of land and compensation to that owner for that taking under a state's eminent domain laws. In this case the Texas courts have refused to consider whether the notice provisions provided by state law for the taking were followed, and the Texas courts have refused to give the land owner any compensation after the taking or

any reasonable opportunity to be heard on the issue of compensation. Thus a state court has decided that a state's procedural due process provided by statute need not be accorded a petitioner for the taking of her realty or for the compensation for that realty. The State court has also decided that in an eminent domain case an individual's federal substantive due process right to a meaningful opportunity to be heard prior to being deprived of property without the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution need not be observed.

This Court has jurisdiction to consider whether the Texas Courts' decisions are in conflict with applicable decisions of this Court such as *Bragg v. Weaver,* 251 U.S. 57, 64 L.Ed. 135, 40 S.Ct. 62 (1919) and *Walker v. Hutchinson,* 352 U.S. 112, 1 L.Ed.2d 178, 77 S.Ct. 200 (1956). Furthermore under 28 USC 1257 (3) in so far as petitioner alleges she is not accorded the due process provided by the federal constitution prior to the State's taking of her land without compensation, this Court has jurisdiction to review her claims. *Chicago B. & Q. R. Co. v. Chicago, Ill.,* 166 U.S. 226, 41 L.Ed. 979, 17 S.Ct. 581 (1897); *Tregea v. Modesto Irr. Dist.,* 164 U.S. 179, 41 L.Ed. 395, 17 S.Ct. 52 (1896).

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV:

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of The State of Texas 1876, Art. I, Sec. 17:

> No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities, shall be made; but all privileges and franchises granted by the Legislature, or created under its authority shall be subject to the control thereof.

Constitution of The State of Texas 1976, Art. I, Sec. 19:

> No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

Title 28 United States Code, Section 1257(3):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . . (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repug-

> nant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Art. 3264 Through 3270 Vernon's Ann. Tex. Statutes have been printed in the Appendix.

STATEMENT OF THE CASE

The First Taking

The somewhat lengthy history of this case began on December 11, 1952 which is the date Mrs. Greer (then Susie Gonzalez) alleges she acquired the property (Rec. p. 2). As alleged the deed contained an easement for a right of way along the southern property line (see exhibit "c", Rec. p. 18) which was granted to Southwestern Bell Telephone Company by the City of Seguin in 1899 for the running of service lines (Rec. p. 11). Sometime between Mrs. Greer's acquisition date and the date of her first suit (cause No. A-6949 in the 125th Judicial District Court of Guadalupe County, Texas) a dispute arose between Mrs. Greer and the City of Seguin and Southwestern Bell as to the existence or dimension of the right of way along her southern property line. The facts and allegations of the first suit are unclear since the records were all lost (Rec. p. 19).

A trial was held in Cause No. A-6949 on the issues raised by Mrs. Greer and her lawyer, and the Court entered judgment on June 24, 1970 against her (Rec. p. 53). Mrs. Greer did not perfect her appeal from the judgment and it became final on or about September 9, 1970.

The Second Taking

Shortly thereafter on or about April 30, 1971 the State of Texas came on to her property and began a public work project for widening State Highway 123 which bordered Mrs. Greer's property on the west. There is no evidence that any notice was given to her prior to this taking. The widening was done and a portion of the property was taken by the State Highway Department. There is no evidence of compensation and Mrs. Greer alleges that she was never compensated for this taking of her property or for the first taking, if any.

On June 21, 1974 with the help of a different lawyer Mrs. Greer filed a suit in the same district court for an equitable bill of review of the earlier action in Cause No. A-6949 (Rec. p. 2). Within the same pleading she filed actions for damages for injuries and assault against the City of Seguin and the State of Texas, and she filed an action for "inverse condemnation." Most importantly, however, she included in this pleading another action for damages against the State of Texas for the second taking of land along the western property line (Rec. pp. 8, 18). She alleged that the property was her motel business which the taking apparently harmed because it cut off reasonable access to her motel (Rec. p. 9). The market value of her property as a business and the market of customers for her motel were reduced by the taking of the property. Mrs. Greer alleged that both takings without compensation violated her state and federal due process rights (Rec. pp. 5, 6, 7, 13).

The City of Seguin answered with a general denial. The State of Texas answered with a special appearance stating that Mrs. Greer had not received permission to

sue the State. Southwestern Bell answered pleading that the action was barred by the statute of limitations, laches and the doctrine of *res judicata;* that her pleading was defective and unsworn; and with a general denial. The cause did not come to trial until August 6, 1979 (Statement of Facts p. 2). Her lawyer withdrew as counsel on September 9, 1976 (Rec. p. 38).

Mrs. Greer personally filed a Motion to Set the Cause on the jury docket on June 14, 1978 (Rec. p. 43). She had paid for her jury demand on either August 16, 1976 or October 26, 1976 (Rec. p. 54). On April 12, 1977 Mrs. Greer received permission from the state legislature to sue the State of Texas (Rec. pp. 56, 57, 58). The case was then called to a *non*-jury trial on August 6, 1979 before a visting district judge (Statement of Facts p. 1). Because she was unable to find a lawyer to take her case Mrs. Greer appeared without counsel (Statement of Facts pp. 3-4). All defendants were represented by counsel (Statement of Facts pp. 4-5).

During the trial no testimony was given and no exhibits were filed or offered as evidence. Mr. Ralph Keehn, attorney for the City of Seguin, told the court that this cause was "exactly the same case as 69-49, which was adjudicated before a jury." (Statement of Facts p. 14) The court asked Southwestern Bell's attorney if the matter had been previously adjudicated "except as to the State of Texas," (Statement of Facts p. 15), and the State's attorney acknowledged that its defense was not *res judicata* with the other defendants, but abatement for lack of permission to sue (Statement of Facts p. 15). The statements of the City attorney thereafter were confusing at best. His unsworn statement was that in the original

suit in A-6949 the City was involved because of the widening of the street on the property line bordering Highway 123 and that "it was all tied together. They had expert testimony. *I wasn't in that trial,* but there was expert testimony . . ." (Statement of Facts p. 18, emphasis supplied). Southwestern Bell's attorney stated, however, that

> in the first suit which is cause Number 69-49, Mrs. Greer sued on the basis *that there were a number of telephone poles that were encroaching* upon her property. The city of Seguin and Southwestern Bell defended saying that these were within the right of way . . . (Statement of Facts p. 16, emphasis supplied)

Exhibit "C" at page 18 of the record shows a map of the property. The telephone poles spoken of by Southwestern Bell are along the Southern boundary (David Street) designated by arrows. It was that right of way which was adjudicated in cause No. 69-49. According to the City attorney the Highway 123 taking on the Western border was decided in that trial, but he was not in that trial.

After some further dialogue the court adjourned and read the pleadings for the first time (Statement of Facts p. 21). Upon returning from adjournment the court found that in the first suit the State of Texas was not a party (Statement of Facts pp. 22-23). Mrs. Greer pointed out to the Court the fact that there were two takings of her land (Statement of Facts pp. 27-28). When it became clear to Mrs. Greer that the bill of review was denied on the first suit, she then asked the judge about cause

no. 74-250—the instant suit (Statement of Facts pp. 30-31). The Court refused to hear evidence on any portion of the cause, including the second taking (Statement of Facts pp. 31-32).

After the judgment was entered Mrs. Greer hired another lawyer to file a motion for new trial and to pursue the appeal. In her motion for new trial Mrs. Greer alleged, *inter alia,* that she was denied her right to a jury (Rec. p. 50) even though she timely requested and paid for a jury trial (Rec. p. 54). She alleged that the first taking of property by Southwestern Bell and the City of Seguin was not done under the condemnation procedures provided by the constitution (Rec. p. 50). She further alleged that the State of Texas was properly joined and that the cause of action against the State should have been severed and tried separately (Rec. p. 51), and that

> . . . if no review is had, [the lack of review] may prejudice a fundamental right against the defendant, State of Texas." (Rec. p. 51)

In the Court of Appeals she argued again that there was a separate cause of action against the State of Texas (Brief for Appellant p. 2). Her prayer contained a general prayer for just relief (Brief for Appellant p. 8).

The Court of Appeals affirmed the trial court as to the ruling on the bill of review because the petition "failed to allege those requirements necessary to support a bill of review." (Opinion p. 2) The appeals court then ruled that even though the State was not a party to the first suit:

> that adjudication should preclude Greer from relitigating that same issue against the State of Texas. (App. p. 4).

An application for writ of error to the Texas Supreme Court was filed to review the judgment of the Court of Appeals. The nature of the case was presented to the Texas Supreme Court in part as a "cause of action against the State of Texas for inverse condemnation" (Brief for Petitioner p. 3). The Supreme Court refused to review the judgment and Mrs. Greer's motion for rehearing which contained the same allegations was denied on September 23, 1981. There is no official publication of this denial, but the ruling of the Court was unofficially published in Vol. 24 No. 45 The Texas Supreme Court Journal page 567 (September 26, 1981).

ARGUMENT

The first question to be reviewed is whether the decision of the Supreme Court of Texas not to review the judgment of the lower court is a decision of the highest court of the State against a right specially set up or claimed under the United States Constitution. The Supreme Court of the State of Texas in reviewing the judgments of the Courts of Appeals is bound by Rule 483 of the Texas Rules of Civil Procedure which states in relevant part:

> . . . In all cases where the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application with the notation "Refused. No reversible error . . ." [cf. *In re Johnson*, 569 S.W.2d 882, 883 (Tex. 1978)].

In this case the Supreme Court has made that very notation in refusing to review this case for error. The Court,

therefore, never assumed jurisdiction of this appeal to make the judgment of the Court of Appeals its own. *Dallas v. Dixon,* supra.

Petitioner asserts that the status of her federal claim after the refusal of the Texas Supreme Court to review, is analogous to that of the petitioner in *Chicago B. & O. R. Co. v. City of Chicago, Ill.,* supra, 17 S.Ct. at 583:

> It is true that the supreme court of Illinois did not, in its opinion, expressly refer to the constitution of the United States, But that circumstance is not conclusive against the jurisdiction of this court to re-examine the final judgment of the State court. The judgment of affirmance necessarily denied the federal rights thus specially set up by the defendant, for that judgment could not have been rendered without deciding adversely to such claims of right.

If, as Mrs. Greer suggests, her realty has been taken in violation of the just compensation clause of the Fifth Amendment applied to the State of Texas by the Fourteenth Amendment, any decision of the highest court of the State which makes no provision for compensation or a meaningful opportunity to be heard violates the provisions of the federal constitution. *Chicago B. & Q. R. Co. v. City of Chicago, Ill.,* supra, 17 S.Ct. page 586

> In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is upon principle and authority, wanting in the due process of law required by the fourteenth amendment of the constitution of the United States, and affirmance of such judgment by the highest court of the State is the denial by that state

of a right secured to the owner by that instrument. *id.*

Thus the fact that the Texas Supreme Court never assumed jurisdiction of the petitioner's appeal on writ of error is irrelevant to the point of whether that court has decided the federal due process question. It remains that the effect of the court's refusal to review perpetuated the alleged existing denial of due process by failing to make provision for compensation for Mrs. Greer or for a reasonable opportunity for her to be heard. The judgment of the state court, or its lack of judgment should be deemed to be the act of the state within the meaning of the fifth and fourteenth amendments. *See Chicago B. & Q. R. Co. v. City of Chicago, Ill.*, supra, at page 584.

Secondly there is no doubt that denial of compensation for a taking of private property for public use without a meaningful opportunity to be heard presents a federal constitutional question which petitioner has set up since the filing of her suit on June 21, 1974 (Rec. p. 2). United States Constitution, Amendments V and XIV; 28 U.S.C. 1257(3); *see Webbs Fab. Pharmacies, Inc. v. Beckwith*, ____U.S.____, 101 S.Ct. 446, 450, 66 L.Ed. 2d 358 (1980); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 122, 98 S.Ct. 2646, 2658, 57 L.Ed.2d 631 (1978).

The second question presented for review is whether there is a conflict between the proceedings of the State courts and petitioner's rights to federal due process in the State's exercise of its eminent domain powers. Articles 17 and 19 of the Texas Constitution of 1876 merely restate the guarantees of the Just Compensation Clause

of the Fifth Amendment to the United States Constitution applied to the States through the Fourteenth Amendment. The principles of the Fifth Amendment have long been held to apply to "all acts of the state, whether through its legislative, its executive, or its judicial authorities." *Scott v. McNeal,* 154 U.S. 34, 14 S.Ct. 1108, 1112 (1894). Consequently whether the constitutional deprivation to Mrs. Greer comes from the action of the Highway Department or the courts of the state, that deprivation is deemed to be the act of the State.

Unlike the case of *Penn Central Transportation Co. v. New York City,* supra, Mrs. Greer alleges an actual taking of property. It is here assumed that the authority for the taking was the state's powers of eminent domain. However no notice or formal claim of authority was actually given nor was a hearing held on the second taking. The City of Seguin argued with Southwestern Bell that it owned the property in the first taking alleged by Mrs. Greer. The State of Texas never argued ownership to either strips of land. On the issue of ownership as to the second taking, the City Attorney admits that he was not at the trial. (Statement of Facts p. 18) The record shows that the land was used for a public purpose, that is, the widening of a public highway and th placing of utility poles. There is no statement by any respondent as to whether the property was "taken for a public use" within the meaning of the constitution but, "the constitution measures a taking of property not by what a state says, or by what it intends, but by what it does." *Hughes v. Washington,* 389 U.S. 290, 298, 88 S.Ct. 438, 443, 19 L.Ed.2d 530 (1967) (Stewart, J., concurring). There is specific evidence of a taking in the record.

Texas constitutional as well as statutory laws provide for compensation to any landowner for a taking of his property for a public use. Texas Const., Art. 1, Sec. 17 and 19; Art. 3264 *et seq.*, Vernon's Ann. Civ. Stats. The procedural scheme is outlined in Arts. 3266 and 3266a, none of which was followed in this case. (See Appendix)

Throughout the proceeding in cause No. 74-250 (the second suit by Mrs. Greer) the court and the lawyer for the City of Seguin and Southwestern Bell discussed ownership of the property. If that issue were decided in cause No. A-6949 in favor of the defendants perhaps the issue of compensation was not necessarily reached. That cannot be determined for certain because of the loss of the record. Nevertheless the State of Texas never claimed ownership of either strip of land, and it never asserted that it was a party to the earlier proceeding. The state plead in abatement and never answered on the merits. Therefore the courts have essentially granted title to the state on the theory of *res judicata,* as to both strips of land—a theory the record shows the state never plead.

If a taking is established the question becomes whether Mrs. Greer has been accorded due process. Petitioner alleges that the question is answered in the express words and purposes of the Just Compensation Clause:

> No person shall . . . be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use, without just compensation. United States Constitution, Amend. V.

At a minimum due process requires that an owner whose property has been taken for a public use must be given a hearing to determine just compensation. *Walker v. City*

of Hutchinson, 352 U.S. 112, 115, 77 S.Ct. 200, 202, 1 L.Ed.2d 178 (1956). In this case there is some evidence of a first trial at which some of the issues were decided, but compensation for Mrs. Greer has never been discussed for either taking. Mrs. Greer asserts that as soon as her private property was taken (outside of any condemnation proceedings) she suffered a constitutional violation. United States Constitution, Amend. V, XIV. The denial of a reasonable opportunity to be heard on the issue of compensation presented another violation of her constitutional rights. *Walker v. City of Hutchinson,* supra.

Mrs. Greer was denied her right to trial by jury; she was not represented by counsel; she was not given an opportunity to present evidence; she was not given an opportunity to cross examine witnesses. It appears from the record that the petitioner was not given the reasonable opportunity to be heard which is essential to due process. *Bragg v. Weaver,* supra, 40 S.Ct. at page 63.

CONCLUSION AND PRAYER

Based upon the foregoing argument and authorities Mrs. Greer asserts that she has been denied the due process of law required by the United States Constitution in eminent domain proceedings, and her property has been taken for a public use without just compensation.

Wherefore Petitioner prays that this Court will assume jurisdiction of this cause and review the judgment of the Court of Appeals for the Eleventh Supreme Judicial District of Texas and of the Supreme Court of Texas. Upon final hearing of this petition, Petitioner prays that

the Court will reverse the judgments of the lower courts and grant her the hearing required by Texas and federal constitutional and statutory laws in eminent domain proceedings.

Respectfully submitted,

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Appendix

APPENDIX

OPINION OF THE COURT OF APPEALS
(Unreported)

No. 5575

SUE GREER
Appellant

vs.

STATE OF TEXAS, Et Al
Appellees

Appeal from Guadalupe County

Sue Greer sued the State Highway Commission as an agent of the State of Texas, the City of Seguin and Southwestern Bell Telephone Company contending that a public right-of-way over certain real property does not in fact exist. She also seeks damages for an alleged trespass by defendants upon her property, and a bill of review. The trial court entered a take nothing judgment against her. Greer appeals. We affirm.

In only two points of error, Greer argues that the trial court erred (1) in denying her a jury trial as to her alleged bill of review and (2) in holding that her cause of action against the State of Texas was res judicata.

The bill of review sought a reopening of cause number A-6949 wherein Greer sued the City of Seguin and Southwestern Bell for damages arriving from their alleged encroachment upon her property. In that cause all issues were found in favor of defendants and Greer appealed.

The appeal was not timely filed and was dismissed by the Fourth Court of Civil Appeals in September 1970. Approximately four years later Greer filed the instant suit, seeking an equitable review of the earlier judgment and damages for the alleged encroachment upon her property.

The original petition in this cause which was signed by Greer and her then attorney, who has withdrawn as counsel, was not verified. There were no allegations that Greer lacked adequate opportunity to present a meritorious claim by reason of fraud, accident, or wrongful act of defendants unmixed with any fault or negligence of her own.

The court in French v. Brown, 424 S.W.2d 893 (Tex. 1967), considering matters necessary to support a bill of review said:

> A bill of review is an equitable proceeding designed to prevent manifest injustice. The relief afforded thereby must be for sufficient cause under Rule 329b (5) of the Texas Rules of Civil Procedure. In Hanks v. Rosser, 378 S.W.2d 31, 1. c. 34 (Tex. Sup. 1964), we restated the rule "that before a litigant can successfully set aside a final judgment he must allege and prove, within the time allowed, (1) a meritorious defense to the cause of action alleged to support the judgment, (2) which he was prevented from making by fraud, accident or wrongful act of the opposite party, (3) unmixed with any fault or negligence on his own part."

There is insufficient cause alleged in the petition in the case at bar for relief by bill of review. Alexander v. Hagedorn, 226 S.W.2d 996 (Tex. 1950); Winters Mut. Aid Ass'n Circle No. 2 v. Reddin, 49 S.W.2d 1095 (Tex. Comm'n App. 1932, holdings approved). Since Greer has

failed to allege those requirements necessary to support a bill of review, the court did not commit reversible error in refusing to submit the cause to a jury. Texas Machinery and Equipment Company v. Gordon Knox Oil and Exploration Company, 442 S.W.2d 315 (Tex. 1969).

Greer's first point of error is overruled.

The court in Benson v. Wanda Petroleum Company, 468 S.W.2d 361 (Tex. 1971), discussing the doctrine of res judicata said:

> Section 83 of the Restatement of Judgments (1942) states that a person who is not a party but who is in privity with the parties in an action terminating in a valid judgment is bound by the rules of res judicata. A comment to this section says in part: "Privity is a word which expresses the idea that as to certain matters and in certain circumstances persons who are not parties to an action but who are connected with it in their interests are affected by the judgment with reference to interests involved in the action, as if they were parties.
>
> * * *
>
> Also, that privity connotes those who are in law so connected with a party to the judgment as to have such an identity of interest that the party to the judgment represented the same legal right.
>
> * * *
>
> But it is also recognized that there is no generally prevailing definition of privity which can be automatically applied to all cases involving the doctrine of res judicata and the determination of who are privies requires careful examination into the circumstances of each case as it arises.
>
> * * *

> In Kirby Lumber Corp. v. Southern Lumber Co., supra, privity was defined as meaning the mutual or successive relationship to the same rights of property; and it was said that persons are privy to a judgment whose succession to the rights of property therein adjudicated are derived through or under one or the other of the parties to the action, and which rights accrued subsequent to the commencement of the action. It has also been said that the Restatement definition corresponds to results generally reached by the courts, the elements of which are summarized in these words: "(t)he word 'privy' includes those who control an action although not parties to it * * *; those whose interests are represented by a party to the action * * *; successors in interests * * *."
>
> * * *
>
> The rules of res judicata rest upon the policy of protecting a party from being twice vexed for the same cause, together with that of achieving judicial economy in precluding a party who has had a fair trial from relitigating the same issue. Bernhard v. Bank of America National Trust & Savings Ass'n, 19 Cal.2d 807, 122 P.2d 892 (1942); and see Semmel, Collateral Estoppel, Mutuality and Joinder of Parties, 68 Colum.L.Rev. 1457 (1968). . . .

The location of the disputed right-of-way was adjudicated in cause number A-6949. Although the State of Texas was not a party to that suit, that adjudication should preclude Greer from relitigating that same issue against the State of Texas. The City of Seguin and the State of Texas, as to the public right-of-way, have an identity of interest and the same legal rights.

We overrule Greer's second point of error.

We have considered and overrule all points of error. The judgment is affirmed.

It is further ordered that this opinion not be published in accordance with TEX.R.CIV.P. 452.

/s/ RALEIGH BROWN
Associate Justice

March 19, 1981

Article 3264. 6506, 6528 Procedure

The exercise of the right of eminent domain shall in all cases be governed by the following rules:

1. When real estate is desired for public use by the State or by a county, or a political subdivision of a county, or by a city or town or by the United States Government, or by a corporation having the right of eminent domain, or by an irrigation district, water improvement district, or a water power control district created by authority of law, the party desiring to condemn the property after having failed to agree with the owner of the land on the amount of damages shall file a statement in writing with the county judge of the county in which the land or a part thereof is situated. It shall describe the land sought to be condemned, state the purpose for which it is intended to be used, the name of the owner, if known, and that the plaintiff and the owner have been unable to agree upon the value of the land or the damages. Where the land lies in two or more counties, in one of which the owner resides, the statement shall be filed in the county of the owner's residence.

2. When such statement is filed with the county judge, he shall, either in term time or vacation, appoint three disinterested freeholders of said county as special commissioners to assess said damages, giving preference to those that may be agreed upon between the parties.

3. The commissioners shall be sworn to assess said damages fairly and impartially and in accordance with law.

4. The commissioners shall promptly set a time and place for hearing the parties, and the day appointed shall be the earliest practicable day, and the place selected shall be as near as practicable to the property in controversy or at the county seat of the county in which the property is situated.

5. Notice in writing shall be issued by the commissioners to each of the parties interested, notifying them of the time and place selected for the hearing.

6. The notices shall be served upon the parties at least ten (10) days before the day set for the hearing, exclusive of the day of the service, and may be served by any person competent to testify, by delivering a copy of such notice to the party, his agent or attorney.

7. When the property sought belongs to the estate of a deceased person or a minor, or other person laboring under disability, and the estate has a legal representative, the notice shall be served upon such representative.

8. When the property belongs to a non-resident of the State, or if the owner is unknown, or if the residence of the owner is unknown, or the owner secretes himself so that the process of law cannot be served upon him, such notice may be served by publication in the manner provided for such service of citation by publication in other civil cases in the district or county court. When the owner is a non-resident of the State the notice may be served as provided in praagraph six hereof.

9. The person serving notice shall return the original to the commissioners on or before the day set for the hearing, with his return in writing thereon, stating how and when it was served.

10. When service of notice has ben perfected, the commissioners shall at the time and place appointed or at any other time and place to which the hearing may be adjourned, proceed to hear the parties.

11. Commissioners shall have the power to compel the attendance of witnesses and production of testimony, administer oaths, and punish for contempt as fully and in the same manner as is provided by law for judges of the county courts.

As amended Acts 1934, 43rd Leg., 2nd C.S., p. 89, ch. 37, § 1; Acts 1961, 57th Leg., p. 203, ch. 105, § 1, eff. Aug. 28, 1961.

Art. 3264a. Eminent domain by counties

The right of Eminent Domain is hereby conferred upon counties of the State of Texas for the purpose of condemning and acquiring land, right of way or easement in land, private or public, except property used for cemetery purposes, where said land, right of way or easement is necessary in the construction of jails, courthouses, hospitals, delinquent and dependent schools, poor farms, libraries or for other public purposes, where such purpose is now or may hereafter be authorized by the Constitution or Statutes of this State.

All such condemnation proceedings shall be instituted under the direction of the commissioners' court, and in the name of the county, and the assessing of damages shall be in conformity to the Statutes of the State of Texas for condemning and acquiring right of way by railroads. That no appeal from the finding and assessment of damages by the commissioners appointed for that purpose

shall have the effect of causing the suspension of work by the county in connection with which the land, right of way, easement, etc., is sought to be acquired. In case of appeal, counties shall not be required to give bond, nor shall they be required to give bond for costs.

Acts 1925, p. 300; Acts 39th Leg., ch. 116, § 1.

Art. 3265. 6518-28 Rule of damages

1. The commissioners shall hear evidence as to the value of the property sought to be condemned and as to the damages which will be sustained by the owner, if any, by reason of such condemnation and as to the benefits that will result to the remainder of such property belonging to such owner, if any, by reason of the condemnation of the property, and its employment for the purpose for which it is to be condemned, and according to this rule shall assess the actual damages that will accrue to the owner by such condemnation.

2. When the whole of a tract or parcel of a person's real estate is condemned, the damages to which he shall be entitled shall be the market value of the property in the market where it is located at the time of the hearing.

3. When only a portion of a tract or parcel of a person's real estate is condemned, the commissioners shall estimate the injuries sustained and the benefits received thereby by the owner; whether the remaining portion is increased or diminished in value by reason of such condemnation, and the extent of such increase or diminution and shall assess the damages accordingly.

4. In estimating either the injuries or benefits, as provided in the preceding article, such injuries or benefits

which the owner sustains or receives in common with the community generally and which are not peculiar to him and connected with his ownership, use and enjoyment, of the particular parcel of land, shall not be considered by the commissioners in making their estimate.

5. When the commissioners have assessed the damages, they shall reduce their decision to writing, stating therein the amount of damages due the owner, if any be found to be due, and shall date and sign such decision and file it together with all other papers connected with the case promptly with the county judge.

6. Where a plaintiff after filing a petition in condemnation, desires to dismiss or abandon the proceedings, said plaintiff shall by a motion filed to the judge of the court be heard thereon, and the court hearing the same shall make an allowance to the landowner for all necessary and reasonable attorneys', appraisers', and photographers' fees and all other expenses incurred to the date of such hearing on said motion; provided, however, after a special commisisoners hearing has been held and the special commissioners have made an award, the plaintiff will not be permitted to dismiss the condemnation proceedings merely to file a new petition in condemnation involving substantially the same taking against the landowner in an effort to secure a lower commissioners award from a second special commissioners hearing. If the plaintiff does dismiss and files a second petition in condemnation to condemn from the same landowner the same substantial interest in the land as in the first petition in condemnation, the landowner is entitled to three (3) times the amount of all expenses allowed the landowner prior to the dismissal of the first petition in condemnation. The

court will not appoint new commissioners under the second petition in condemnation, but the court will merely enter the special commissioners award as previously found under the first petition in condemnation as the award of the special commissioners in the second petition filed by the plaintiff.

7. The owner of the land who is actually and physically displaced and permanently moved from his dwelling or place of business shall be entitled to, as a separate item of damages, the reasonable moving expenses for personal property when personal property is moved from a place of residence or from a place of business, but the maximum distance of movement to be considered shall be fifty (50) miles. In no event shall such expenses exceed the market value of such personal property; provided, however, that the provisions of this section shall not apply in any condemnation proceeding whether before special commissioners or the court where the owner is entitled to reimbursement for moving expenses under other existing law.

Subds. 6, 7 added by Acts 1969, 61st Leg., p. 2293, ch. 772, § 1, eff. Sept. 1, 1969; amended by Acts 1979, 66th Leg., p. 449, ch. 206, § 1, eff. May 17, 1979.

Art. 3266. 6507-28 General provisions

1. When the county judge is disqualified to act in the case, and the parties fail to agree upon a special judge, he shall certify such disqualification upon the petition or statement filed with him, and file it with the county clerk, who shall make a certified copy thereof and of the endorsement thereon and forward the same to the Governor, who shall appoint some person learned in the law

to act as special judge, and such special judge when appointed and qualified, shall proceed with the case to its final conclusion, or the parties may agree upon a special judge.

2. The county judge may appoint other commissioners when one or more of those appointed shall fail to serve.

3. Commissioners shall receive for their services an amount fixed by the Commissioners Court, who shall set the fee of the commissioners at any amount they may deem reasonable, but not less than Five Dollars ($5) for each day they are engaged in the performance of their duties.

(a) In all counties where County Courts at Law, or District Courts are given exclusive or concurrent jurisdiction to try and dispose of eminent domain proceedings and cases, each of such courts shall have jurisdiction to tax or re-tax a reasonable fee of not less than $10.00 each as a part of the costs of court to each of the Special Commissioners sitting as a tribunal to hear and dispose of the Administrative Proceedings following the filing of a condemnation proceeding with the judge or with the court.

4. The party seeking to condemn the property shall pay the expense of serving notice upon the owner, but may recover from the owner such expenses when it is decided that the owner shall pay the costs.

5. The commissioners may adjudge the costs against either party, and shall make a statement in writing of all the costs which have accrued and state therein the party against whom such costs have been adjudged, and shall sign such statement and deliver it with the other papers.

6. If either party be dissatisfied with the decision, such party may, on or before the first Monday following the 20th day after the same has been filed with the county judge, file his objection thereto in writing, setting forth the grounds of his objection, and thereupon the adverse party shall be cited and the cause shall be tried and determined as in other civil causes in the county court. In computing the period of time prescribed or allowed by this Subdivision, the last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor a legal holiday.

7. If no objections to the decision are filed within the time prescribed by Subdivision 6 of this Article, the County Judge shall cause said decision to be recorded in the minutes of the County Court, and shall make the same the judgment of the court and issue the necessary process to enforce the same.

8. In counties in which the jurisdiction of eminent domain cases is in the district courts or county courts at law, the judges and clerks of said courts shall perform the functions in such proceedings as provided by law for county judges and clerks.

Acts 1941, 47th Leg., p. 872, ch. 543, § 1. Amended by Acts 1955, 54th Leg., p. 537, ch. 166, § 1; Acts 1959, 56th Leg., p. 874, ch. 399, § 1, eff. May 30, 1959; Acts 1961, 57th Leg., p. 203, ch. 105, §§ 2-4; Acts 1965, 59th Leg., p. 766, ch. 357, § 1, eff. June 9, 1965; Acts 1967, 60th Leg., p. 1766, ch. 669, § 1, emerg. eff. June 17, 1967.

Art. 3266a. Jurisdiction

Section 1. The district courts of all counties in the State shall have jurisdiction concurrent with the county courts at law in eminent domain cases. The county courts shall have no jurisdiction in eminent domain cases.

Sec. 2. In all counties in which there is no county court at law with jurisdiction of eminent domain cases, the party desiring to initiate condemnation proceedings shall file its petition with the district judge; and objections to the award of the special commissioners shall be filed in the district court.

Sec. 3. In all counties in which there is one or more county courts at law with jurisdiction in eminent domain cases, the party desiring to initiate condemnation proceedings shall, except where otherwise specifically provided by law, file its petition with the judge of the county court at law; and objections to the award of the special commissioners shall be filed in that county court at law.

Sec. 4. In any eminent domain case pending in the county court at law, whenever the judge of the court determines that the controversy involves a genuine issue of title or any other matter which cannot be fully adjudicated in the county court at law, he shall transfer the case to the district court.

Sec. 5. This Act shall not be construed to alter the provisions of Article 3266, Revised Civil Statutes of Texas, 1925, as amended, except that the court in which a petition is filed to initiate condemnation proceedings, under the provisions of this Act, shall appoint the special commissioners.

Sec. 6. The provisions of this Act shall not apply to any proceeding pending on the effective date of this Act. Acts 1971, 62nd Leg., p. 2536, ch. 832, §§ 1-6, eff. June 9, 1971.

Art. 3266b. Relocation assistance program

Section 1. When in the acquisition of real property for a program or project undertaken by any department, agency, or instrumentality of this State or of a political subdivision of this State it becomes necessary that any individual, family, property of a business concern, farm or ranch operation, or nonprofit organization be displaced, they may be paid their moving expenses and relocation payments, provided financial assistance to acquire replacement housing, or allowed rental supplements and compensation for expenses incidental to the transfer of property to the State, all of which payments or expenditures are hereby declared to be an expense and cost of such property acquisition. Each department, agency, or instrumentality of this State or of a political subdivision of this State shall formulate the rules and regulations necessary to carry out the provisions of this section and shall not authorize payments or expenditures in excess of those authorized by or under the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Program.

Sec. 1A. A person who moves or discontinues his business, or moves other personal property, or moves from his dwelling on or after the effective date of this Act, as the direct result of displacement by code enforcement, rehabilitation, or demolition programs shall, for the

purposes of this Act, be deemed to have been displaced as the result of the acquisition of real property.

Sec. 2. Each department, agency, or instrumentality of this State or of a political subdivision of this State may provide a relocation advisory service for all individuals, families, business concerns, farm and ranch operations, and nonprofit organizations which shall be compatible with the Federal Uniform Relocation Assistance Advisory program.[1]

Sec. 3. The Comptroller of Public Accounts is hereby authorized to issue a State Warrant on the appropriate account of each State department or agency for all relocation costs and the costs of administering the relocation assistance program.

Acts 1969, 61st Leg., p. 133, ch. 45, eff. April 2, 1969. Amended by Acts 1971, 62nd Leg., p. 2817, ch. 918, § 1, eff. Aug. 30, 1971; Sec. 1 amended by Acts 1973, 63rd Leg., p. 1625, ch. 586, § 1, eff. Aug. 27, 1973; Sec. 1A added by Acts 1973, 63rd Leg., p. 1626, ch. 586, § 2, eff. Aug. 27, 1973.

Art. 3267. 6529, 4470, 4204 How costs awarded

The costs of the proceedings before the commissioners and in the court shall be determined as follows, to-wit: If the commissioners shall award greater damages than the plaintiff offered to pay before the proceedings commenced, or if objections are filed to the decision in the county court under the provisions of this title, and the judgment of the court is for a greater sum than the

1. See 23 U.S.C.A. § 501, et seq.

amount awarded by the commissioners, then the plaintiff shall pay all costs; but if the amount awarded by the commissioners as damages or the judgment of the county court shall be for the same or less amount of damages than the amount offered before proceedings were commenced, then the costs shall be paid by the owner of the property.

Art. 3268. 6530, 4471, 4205 Damages paid first

If the plaintiff in the condemnation proceedings should desire to enter upon and take possession of the property sought to be condemned, pending litigation, it may do so at any time after the award of the commissioners, upon the following conditions, to-wit:

1. It shall pay to the defendant the amount of damages awarded or adjudged against it by the commissioners, or deposit the same in money in court, subject to the order of the defendant, and also pay the costs awarded against it.

2. In addition thereto, it shall deposit in said court either (a) a further sum of money equal to the amount of the damages awarded by the commissioners, or (b) a surety bond in an amount equal to the amount of the damages awarded by the commissioners issued by a surety company duly qualified to do business in this State, and which shall be held, together with the award itself, should it be deposited in court instead of being paid, exclusively to secure all damages that may be awarded or adjudged against the plaintiff, and if a surety bond is deposited in lieu of money, it shall be conditioned so as to secure all damages in excess of the award of the special com-

missioners, that may be awarded or adjudged against the plaintiff; and it shall also execute a bond with two or more good and solvent sureties, to be approved by the judge of the court in which such condemnation proceedings are pending, conditioned for the payment of any further costs that may be adjudged against it, either in the court below or upon appeal. The State, a county, municipal corporation, irrigation district, water improvement district or water power control district created under authority of law, shall not be required to deposit a bond or the amount equal to the award of damages by the commissioners or a surety bond in such payment, as provided in this Section 2 hereof.

If the plaintiff deposits money under alternate (a) above, such sum of money shall be deposited or invested by the court in an interest-bearing or noninterest-bearing account with, or in an interest-bearing or noninterest-bearing certificate or security issued by, any state or national bank situated in the State of Texas, as may be requested and designated by the plaintiff. The interest-accruing from such account, certificate or security, if any, shall be paid to the plaintiff.

Subd. 2 amended by Acts 1971, 62nd Leg., p. 2859, ch. 938, § 1, eff. June 15, 1971.

3. Should it be determined on final decision of the case that the right to condemn the property in question does not exist, the plaintiff shall surrender possession thereof, if it has taken possession pending litigation, and the court shall so adjudge and order a writ of possession for the property in favor of the defendant, and the court may also inquire what damages, if any, have been suf-

fered by the defendant by reason of the temporary possession of the plaintiff, and order the same paid out of the award or other money deposited; provided, that in any case where the award paid the defendant or appropriated by him exceeds the value of the property as determined by the final judgment, the court shall adjudge the excess to be returned to the plaintiff.

If the cause should be appealed from the decision of the county court, the appeal shall be governed by the law governing appeals in other cases; except the judgment of the county court shall not be suspended thereby.

Const. art. 1, sec. 17; Acts 1899, p. 105. Amended by Acts 1930, 41st Leg., 4th C.S., p. 75, ch. 37, § 1; Acts 1934, 43rd Leg., 2nd C.S., p. 89, ch. 37, § 2.

Art. 3269. 6531, 4472 Practice in case specified

When the State of Texas, or any county, incorporated city, or other political subdivision, having the right of eminent domain, or any person, corporation or association of persons, having such right, is a party, as plaintiff, defendant or intervenor, to any suit in a District Court, in this State, for property or for damages to property occupied by them or it for the purposes of which they or it have the right to exercise such power of eminent domain, or when a suit is brought for an injunction to prevent them or it from going upon such property or making use thereof for such purposes, the Court in which such suit is pending may determine the matters in dispute between the parties, including the condemnation of the property and assessment of damages therefor, upon petition of the plaintiff, cross-bill of the defendant or plea

of intervention by the intervenor asking such remedy or relief; and such petition, cross-bill of plea of intervention asking such relief shall not be an admission of any adverse party's title to such property; and in such event the condemnor may assert his or its claim to such property and ask in the alternative to condemn the same if he or it fails to establish such claim; and provided that, if injunctive relief be sought, the Court may grant such relief under the Statutes and Rules of Equity, or may, as a prerequisite for denying such relief, require the party seeking condemnation to give such security as the Court may deem proper for the payment of any damages that may be assessed on such party's pleading for condemnation.

Acts 1899, p. 18; Acts 1931, 42nd Leg., p. 413, ch. 245, § 1; Acts 1945, 49th Leg., p. 404, ch. 259, § 1.

Art. 3270. 6532, 4473, 4206 Property, how construed

Except where otherwise expressly provided by law, the right secured or to be secured to any corporation or other plaintiff in this State, in the manner provided by this law, shall not be so construed as to include the fee simple estate in lands, either public or private, nor shall the same be lost by the forfeiture or expiration of the charter, but shall remain subject to an extension of the charter or the grant of a new charter without a new condemnation.

Acts 1861, p. 12.

Opposition

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81-1186

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

SUE GREER,
Petitioner

V.

THE CITY OF SEQUIN, TEXAS
SOUTHWESTERN BELL TELEPHONE COMPANY
and
THE STATE OF TEXAS,
Respondents

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

William W. Rittenhouse
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ATTORNEY FOR RESPONDENT,
The City of Sequin

QUESTIONS PRESENTED FOR REVIEW

1. Whether the petition for Writ of Certiorari properly presents this case for review by the United States Supreme Court in any manner affecting the City of Sequin because there was no review by the Supreme Court of the State of Texas of the judgment in favor of the City of Sequin.

2. Whether there are adequate state grounds to support the decisions of the Courts of the State of Texas.

LIST OF PARTIES

1. Sue Greer, Petitioner
2. The City of Sequin, Texas, Respondent
3. Southwestern Bell Telephone Company, Respondent
4. The State of Texas, Respondent

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OPINIONS BELOW

The opinion of the State Court of Appeals, set out in the appendix to the Petition, is not the ruling of the highest Court of the State of Texas on this matter. The Supreme Court of the the State of Texas reviewed this cause in an Application for Writ of Error, and denied said application finding "no reversible error."

Petitioner did not apply for Writ of Error in so far as the judgment of the Texas Court of Civil Appeals affirmed the judgment of the trial Court in favor of the City of Sequin. In other words, the City of Sequin was no longer a party to this lawsuit when it was before the Supreme Court of the State of Texas on an application for Writ of Error. Petitioner expressly declined to attack the judgment in so far as it affected the City of Sequin. See Petition for Writ of Error, Page 8, Footnote 1 (Appendix).

JURISDICTION OF THIS COURT

Jurisdiction of this Court is non-existent in so far as the City of Sequin was not a party to this cause when it was presented to the Supreme Court of the State of Texas.

An additional basis for asserting that this Honorable Court has no jurisdiction in this cause is that the judgments of the state Courts were properly founded on state law.

STATEMENT OF THE CASE

Petitioner sued the City of Sequin and

Southwestern Bell Telephone Company, and tried the case on the merits to a final judgment in 1970, and never perfected appeal from that judgment. Almost four years later Petitioner sued the City of Sequin, Southwestern Bell Telephone Company, and the State of Texas, alleging, as to the City of Sequin, the same complaint that was tried to judgment in 1970. In this latter suit, Petitioner sought an equitable bill of review of the judgment rendered in 1970. The trial Court ruled that the plea of *res judicata* interposed by the City of Sequin was well taken and that Petitioner should take nothing against the City of Sequin by her suit for bill of review. The Court found that there were no allegations which would justify a re-trial by way of equitable bill of review. That judgment was imminently sound and was properly affirmed by the Court of Civil Appeals.

ARGUMENT

Since the City of Sequin was no longer a party to this suit before the Supreme Court of the State of Texas, it is clear that this suit is not reviewable in this

Honorable Court, in so far as the City of Sequin is concerned. After more than a decade of litigation, this matter was finally terminated in so far as the City of Sequin was concerned, when the Petitioner did not choose to name the City of Sequin as a respondent in her Petition for Writ of Error in the Supreme Court of the State of Texas. Petitioner stated no points of error affecting the judgment in favor of the City of Sequin. No further argument should be required on this point since the statutory definition of the jurisdiction in 28 USC Sec. 1257 provides for jurisdiction in the U. S. Supreme Court to review the final judgments or decrees rendered by the highest Court of a State by ... Writ of Certiorari. The judgment of the Court of Civil Appeals, not being that of the highest Court of the State of Texas, is not reviewable in the Honorable Court. *Gorman* v. *Washington University*, 316 US 98, 86 L.Ed. 1360, 62 S.Ct. 962 (1945).

By way of further argument, although it is respectfully suggested that none should be needed, the City of Sequin asserts that there are no questions other than those of state law involved in any of the actual holdings of any

of the Courts below. This Court has adhered to the principal that it will not review judgments of state Courts that rest on adequate and independent state grounds. *Murdock v. Memphis*, 20 Wall. 590, 22 L.Ed. 429 (1875); *Herb v. Pitcairn*, 324 U.S. 117, 125-126, 65 S.Ct. 459, 463, 89 L.Ed. 789, (1945); *Fox Film Corp. v. Muller*, 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158 (1935). The finality of the 1970 judgment was never attacked by appeal. It was attacked by equitable bill of review, which the trial Court found not supported by even the proper allegations, to say nothing of evidence. Nowhere in the Petitioner's brief, and nowhere in the law, is there any authority for the proposition that a person is entitled as a matter of any right founded on the United States Constitution, Treaties, or law, to require a re-trial on any final judgment from which no appeal was taken without at least alleging the statutory grounds for an equitable bill of review.

Thus, it is quite clear that the petition does not draw into question the validity of any state statute on the ground of its being repugnant to the United States Constitution, Treaties, or law.

CONCLUSION

The Writ of Certiorari should be denied by the Court in this case and the judgment of the Court of Civil Appeals of the State of Texas should not be reviewed, in so far as said judgment is in favor of the City of Sequin because:

1. Said Court of Civil Appeals judgment was not the subject of a Petition for Writ of Error in the Supreme Court of the State of Texas naming the City of Sequin as a party; therefore, no question is presented in the petition which is in the jurisdiction of this Honorable Court.

2. Alternatively, it is quite clear that no substantial federal question is presented for review.

WHEREFORE, PREMISES CONSIDERED, Respondent, the City of Sequin, prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

William W. Rittenhouse
1215 Perry Brooks Bldg.
Austin, Texas 78701
512-476-4800
ATTORNEY FOR RESPONDENT
The City of Sequin

APPENDIX

NO. C 374

IN THE SUPREME COURT OF TEXAS

* * * * * * *

SUE GREER

PETITIONER

VS.

STATE OF TEXAS

RESPONDENT

* * * * * * *

APPLICATION FOR WRIT OF ERROR

* * * * * * *

SOUTHERS & LYONS, INC.
126 Villita Street
San Antonio, Texas 78205
(512) 225-5251

By: Stephen Dittlinger

ATTORNEYS FOR PETITIONER

Petitioner's first cause of action against the State was based upon a wrongful taking of approximately 105 feet along the East right of way line of Highway 123. [Tr. 6-9]. This area is illustrated on "Exhibit C" of Plaintiff's Original Petition. [Tr. 18]. Petitioner's complaint against Southwestern Bell and the City however, alleges that the utility unlawfully erected telephone poles on her land in a line running parallel...

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to David Street and that this action constituted a common-law nuisance [Tr. 12].[1] "Exhibit C" clearly shows that if the poles in question ran parallel to David Street then they could not possibly be part of the 105 feet East right of way allegedly taken by the State. David Street and Highway 123 are situated perpendicular to one another. [Tr.18].[2]

...

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[1] The original petition also alleges causes of action against Southwestern Bell and the City which are not challenged in this appeal.

[2] According to "Exhibit C" [Tr. 18] Highway 123 runs in a north-south direction, while David Street runs east-west.

Opposition

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NO. 81-1186

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

SUE GREER,

Petitioner

V.

THE CITY OF SEGUIN, TEXAS.
SOUTHWESTERN BELL TELEPHONE COMPANY
and
THE STATE OF TEXAS,

Respondents

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF UNITED STATES

SOUTHWESTERN BELL TELEPONE COMPANY BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the petition for Writ of Certiorari properly presents this case for review by the United States Supreme Court in any manner affecting Southwestern Bell Telephone Company because there was no review by the Supreme Court of the State of Texas of the judgment in favor of Southwestern Bell Telephone Company.

2. Whether there are adequate state grounds to support the decisions of the Courts of the State of Texas.

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2. The City of Seguin, Texas, Respondent
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   The State of Texas, Respondent

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NO. 81-1186

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

SUE GREER,
Petitioner

V.

THE CITY OF SEQUIN, TEXAS
SOUTHWESTERN BELL TELEPHONE COMPANY
and
THE STATE OF TEXAS,
Respondents

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF UNITED STATES

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIOARI

OPINIONS BELOW

The opinion of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas is set out in the Appendix, page A-1

et seq., to the Petition filed herein by Sue Greer. There is no opinion of the Supreme Court of Texas for the reason that the Application for Writ of Error filed by Ms. Greer before the Supreme Court of Texas was denied and there was no review by the Texas Supreme Court for the reason that they found "no reversible error."

There is no opinion from the highest Court of the State of Texas with regard to any issues affecting Southwestern Bell Telephone Company. A copy of the Application for Writ of Error filed by Ms. Greer is included in the Appendix of the brief filed herein on behalf of Respondent City of Seguin. For purposes of this brief, Respondent Southwestern Bell Telephone Company specifically refers to said copy contained in the brief of City of Seguin and incorporates it in this brief for full consideration of this honorable Court.

JURISDICTION OF THE COURT

This Court does not have jurisdiction insofar as Southwestern Bell Telephone Company is concerned for the reason that this Respondent was never a party to any Application for Writ of Error before the highest Court in this State, the Supreme Court of the State of Texas. Further, all issues relative to Southwestern Bell Telephone Company had been fully determined by lower Courts and no appeal was perfected relative to those issues founded upon State law.

STATEMENT OF THE CASE

This Respondent would adopt the Statement of the Case as shown in the brief filed by Respondent City of Seguin and shows that the case evolved and was terminated relative to Southwestern Bell Telephone Company in the same manner as it was in regard to the City of Seguin.

ARGUMENT

This Court has no jurisdiction to consider a Petition for Writ of Error with regard to any action of Sue Greer against Southwestern Bell Telephone Company. It is clear from looking at the record filed in the Supreme Court of the State of Texas and Ms. Greer's Application for Writ of Error (copy included in Appendix to brief filed by Respondent City of Seguin), Southwestern Bell Telephone Company was not even a party to any review of any issues before the Supreme Court of the State of Texas. The style of the case as shown on the face of her Application for Writ of Error was "Sue Greer, Petitioner vs. State of Texas, Respondent". (See Rule 469, Texas Rules of Civil Procedure.) In each statement regarding a point of error in the Application for Writ of Error, Petitioner charged error in "affirming the Trial Court's Take Nothing Judgment in favor of the State of Texas". On page 8 of said

Application, footnote 1 states it clearly: "The original petition alleges causes of action against Southwestern Bell and the City which are not challenged in this appeal. (Emphasis added.) Also, in the very last sentence in the section styled "Statement, Argument and Authorities", the Applicant before the Supreme Court of the State of Texas states, "It is respectfully submitted that the judgments of the Courts below be reversed and the cause remanded for a new trial with respect to Petitioner's cause of action against the State for inverse condemnation and wrongful taking of her property." (Emphasis added.) Finally, the Certificate of Service on said Application for Writ of Error before the Supreme Court of Texas shows that service was had upon the State of Texas only and that Southwestern Bell Telephone Company was not even notified of any appeal to the highest Court in the State.

The position of Respondent Southwestern Bell Telephone Company is, therefore, the same as that set forth in the Argument by the City of Seguin. Petitioner abandoned any appeal against Southwestern Bell Telephone Company when it filed its Application for Writ of Error before the Supreme Court of the State of Texas and failed to make Southwestern Bell Telephone Company a party to that appeal; and, she failed to obtain an opinion of the highest Court of the State of Texas with regard to issues affecting Southwestern Bell Telephone Company.

Authorities are adequately stated in the brief filed on behalf of the State of Texas and City of Seguin concerning the jurisdiction of this Court to review any issues that have not been reviewed by the highest Court of the State and that decisions with regard to State law are clearly binding as a general rule upon

this Court, i.e., Gorman v. Washington University, 316 US 98, 86 L.Ed. 1360, 62 S.Ct. 962 (1945); Murdock v. Memphis, 20 Wall. 590, 22 L.Ed. 429 (1875); Herb v. Pitcairn, 324 U.S. 117, 125-126, 65 S.Ct. 459, 463, 89 L.Ed. 789, (1945); Fox Film Corp. v. Muller, 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158 (1935).

It is clear from the records of the Appellate Courts that the Petitioner herein has failed to establish a right to appeal to or jurisdiction of the Supreme Court of the United States.

CONCLUSION

The Writ of Cerciorari should be denied by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief of Respondent Southwestern Bell Telephone Company has been mailed by certified mail, return receipt requested, to the respective attorneys for the parties in this cause as follows: Mr. George Scharmen, 200 Main Plaza, San Antonio, Texas 78205, Mr. Joe D. Jarrard, Jr., P. O. Box 5075, Austin, Texas 78763, and Mr. William W. Rittenhouse, 1215 Perry Brooks Building, 121 East Eighth Street, Austin, Texas 78701, on this the 9th day of February, 1982.

Jerry R. Tucker, Sr.

JERRY R. TUCKER, SR.

Opposition

3

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STATE RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The first question presented for review is whether there are adequate state grounds to support the decisions of the courts of the State of Texas.

The second question presented for review is whether the alleged federal constitutional due process claims were timely raised by Petitioner in a way that would permit meaningful adjudication in the state courts, and whether the question was properly preserved for review by this court.

The third question presented for review is whether Petitioner has been denied any constitutional due process rights.

LIST OF PARTIES

Petitioner is Sue Greer.

Respondents are the City of Seguin, Texas, Southwestern Bell Telephone Company and the State of Texas.

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OPINIONS BELOW

The opinion of the State Court of Appeals is faithfully reproduced in the appendix to the Petition. Petitioner made application to the Supreme Court of Texas for Writ of Error which was denied with the notation "Refused. No reversible error." Petitioner's Motion for Rehearing to the Supreme Court of Texas was overruled September 23, 1981.

JURISDICTION OF THIS COURT

Jurisdiction of this Court is doubtful for the following reasons:

(1) The Petition and the appellate opinions of the state courts show on their faces an adequate state ground to support the decisions below without reaching any of the constitutional questions alleged.

(2) There has been a failure of Petitioner to properly present the merits of her federal claim in a timely fashion in the state courts so that those courts could meaningfully pass upon the question and a failure to adequately preserve the question urged for review by this Court.

This Court, since the time of its foundation, has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. *Herb v. Pitcairn*, 324 U.S. 117, 125-126, 65 S.Ct. 459, 463, 89 L.Ed. 789 (1945); *Murdock v. Memphis*, 20 Wall. 590, 22 L.Ed. 429 (1875); *See, E.g., Monger v. State of Florida*, 405 U.S. 958, 92 S.Ct. 1163, 31 L.Ed.2d 236 (1972). This Court has also stated repeatedly that state court decisions on state law are binding upon it, except in the instance of well-defined exceptions which are not met by the instant case. *Murdock v. Memphis, supra; Berea College v. Kentucky*, 211 U.S. 45, 29 S.Ct. 33, 53 L.Ed. 81 (1908); *Fox Film Corp. v. Muller*, 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158 (1935); *See*, C. A. Wright, Handbook of the Law of Federal Courts, 3rd Ed., §107, at pp. 542-543 (West, 1976).

Petitioner is seeking review of an appellate opinion holding that Petitioner "failed to allege those requirements necessary to support a bill of review." (Petition Appendix, p. A3). This holding is based upon the

requirements of substantive and procedural state law which govern the burden to be borne by litigants, including Petitioner, who bring actions of the type called a "bill of review" in Texas. (Petition Appendix, pp. A2-A3). The appellate opinion in the Appendix contains one other ground for decision; it holds that Petitioner's claims are barred by *res adjudicata* arising from her prior unsuccessful litigation of the same issues presented in the instant case. (Petition Appendix, pp. A3-A4). Petitioner has not argued that either basis of decision is erroneous; indeed, to do so would be to urge this Court's review of state court decisions on state law, an area which this Court has repeatedly held is beyond the reach of its appellate or certiorari jurisdiction over state court decisions. *Murdock v. City of Memphis, supra; Mullaney v. Wilbur,* 421 U.S. 684, 691 95 S.Ct. 1881, 1886, 44 L.Ed.2d 508 (1975); *Winters v. New York,* 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840 (1948).

Petitioner's case in the state courts was relegated to the status of an equitable action for bill of review and the rules applicable thereto because Petitioner had failed to appeal and was attempting to attack the first adverse judgment she received on her property claims and was attempting to challenge the earlier judgment by an equitable proceeding filed four years after her right of appeal to the judgment had lapsed. This approach resulted directly from the failure to perfect an appeal from the initial judgment (Petition, p. 5). Thus, the posture of the instant case and the attempt to read into the state court decisions an alleged constitutional issue are a direct consequence of Petitioner's failure to preserve her constitutional issues for review by perfecting an appeal from the first judgment. Failure of Petitioner to perfect a timely appeal from the earlier adverse judgment constitutes a waiver of the issue which Petitioner is now urging this Court to consider. *Beck v. Washington,* 369 U.S. 541, 549-553, 82 S.Ct. 955, 960-962, 8 L.Ed.2d 98 (1962).

There is no evidence in the Petition that the due process claim urged upon this Court was ever raised in the state courts before. Ordinarily, the writ of certiorari is not granted to consider for the first time questions that were not raised before in the state court. *Tacon v. Arizona*, 410 U.S. 351, 92 S.Ct. 998, 35 L.Ed.2d 346 (1973).

For the reasons stated, this Respondent doubts that the certiorari jurisdiction of this Court has been properly invoked by Petitioner.

STATEMENT OF THE CASE

On December 28, 1981, the State Respondent received three copies of the Petition for Writ of Certiorari. This case is Petitioner's second lawsuit denying the existence of the road rights-of-way on "her property". The first lawsuit was brought by Petitioner and was decided adversely to her in 1970; no appeal was taken from the judgment in that case. There is nothing in the record as to the circumstances of the original acquisitions of the rights-of-way, whether along the southern boundary or the western boundary. Petitioner first disputed the existence of the rights-of-way over her property in her first lawsuit aginst the Telephone Company and the City of Sequin, (cause number A-6949) in which she litigated and was heard on the location and dimensions of the boundaries of "her property" (opinion of the state court of appeals - appendix to Petition p. A-1). The judgment, unfavorable to Petitioner became final and *was not appealed* by Petitioner (Petition p. 5). The case at bar sought a bill of review of that lawsuit and additionally alleged an inverse condemnation against the State for what she now calls "the second taking", alleging the same factual basis already litigated in the first lawsuit that there were no rights-of-way over "her property". The case in the state courts ended in the Supreme Court of Texas overruling Petitioner's Motion for Rehearing.

Petitioner's statement of the case contains serious factual inaccuracies. Petitioner designates the first taking, along her southern property line and conceding that the facts and allegations of the first suit are unclear, she nonetheless asserts that the dispute there was as to the existence and dimensions of the rights-of-way along her southern property line, ignoring its intersection with the western property line and the corner there formed. Petitioner designates the second taking on the western line of her property and alleges that she was never compensated for this taking of her property or for "the first taking, if any", ignoring that the rights-of-way were acquired from her predecessors in title.

Petitioner's statement of the case makes numerous references that are outside the record in the state court proceedings as well as this Court. An outrageous inaccuracy is Petitioner's assertion that the Supreme Court of Texas refused to review the judgments below and Petitioner's Motion for Rehearing, when it is actually clear that the Supreme Court of Texas, after considering Petitioner's application for Writ of Error, reviewed the judgments below and refused Petitioner's application for Writ of Error and later, after considering Petitioner's Motion for Rehearing, overruled Petitioner's Motion.

ARGUMENT

The Petition for Writ of Certiorari in this case is reminiscent of Petitioner's state court briefs in that in the state court she asserted, first, her absolute right to a jury trial and, second, that "res adjudicata" was inapplicable to the state because the State was not a party *eo nominee* to the first suit. Now before this Court her position seems to be that she had an absolute right in her second suit to a hearing as to compensation and the amount thereof on her assumption that her property has

been taken twice without just compensation. *If* her property had been taken at all, the State Respondent would concede her right to just compensation. Petitioner's argument assumes the converse of this crucial fact which was found adversely to her in the first suit which held, in effect, that her property had not been taken.

As to Petitioner, it is conceded no statutory eminent domain procedures were invoked for any taking of Petitioner's land for the reason that none of Petitioner's land was needed or taken. The rights-of-way had long since been acquired. Now, Petitioner by her first suit and by her second suit denies the existence of the rights-of-way over her land and asserts the use of the existing rights-of-way constitute new takings without just compensation and complains of violations of her federal constitutional rights by the very court procedures by which she sought relief. She asserts that somehow the civil court procedures on both the trial court level and the appellate court level contained a constitutional vice. Bosh! Petitioner's property when she purchased it was burdened by rights-of-way along her southern boundary (David Street) and northern boundary (Guadalupe Street -Highway 123) which she still contends in fact do not exist, although their prior and continuing existence was determined in her first suit. In the case at bar she sought equitable review but did not allege cause for relief by a bill of review (p. A2 of the appendix to the Petition and the cases there cited); she contended that the determinations in her first suit were not available to the State under Res Adjudicata. They are. (pp. A3 and 4 of the appendix to the Petition and the cases there cited). The opinion of the state court of appeals specifically dealt with her complaints and as the court wrote:

> "The location of the disputed right-of-way was adjudicated in cause number A-6949. Although the State of Texas was not a party to

> that suit, that adjudication should preclude Greer from relitigating that same issue against the State of Texas. The City of Seguin and the State of Texas, as to the public right-of-way, have an identity of interest and the same legal rights." (p. A4, of the appendix to Petition).

Petitioner, in argument (p. 13 of the Petition) states: "There is specific evidence of a taking in the record." There is no such evidence unless Petitioner is referring to the right-of-way acquisitions from her predecessors in title, in which event of course Petitioner has no claim for compensation against anyone, save perhaps her predecessors in title as to any deficiencies in conveyances which might have ignored then-existing rights-of-way.

Petitioner argues that she has suffered a denial of due process of law by the Texas Supreme Court's refusal of her application for writ of error with the notation "refused, no reversible error." This is like arguing that this Court's refusal to grant a petition for writ of certiorari is a denial of due process rights. This is obviously not a proper application of due process principles. In fact, the refusal of Petitioner's application for writ of error in the state court with the notation "no reversible error" shows on its face that Texas' highest court gave ample consideration to the opinion of the Texas Court of Civil Appeals to justify its notation. There is nothing in the record to suggest that Petitioner's application for writ of error was treated any differently procedurally from the many other such applications before the Court at that time. For Petitioner to suggest that her application for writ of error should have been given special treatment because it contains a property claim is a departure from the due process cases in which this Court has held that appellate review, when provided by state courts, should be accorded even-handedly to all those who seek it. *E.g., Griffin v. People of the State of Illinois*, 351 U.S. 12, 18-19, 76 S.Ct. 585, 590-591 (1956).

The main thrust of Petitioner's arguments is that her property has been taken for public use without just compensation, and that the hearings she has repeatedly been afforded on her property claims have amounted to a denial of due process. The question of whether her property has been taken at all has been fully litigated; the holding that there were pre-existing valid easements which Petitioner does not wish to recognize does not show that her property has been taken from her without just compensation. This writer can find no legal authority, constitutional or other, which requires the State or any entity with powers of eminent domain to pay more than once for property taken for public use. A failure to pay twice for the same easement rights does not equal a taking of property without payment of just compensation.

There is no doubt that the taking of property for public use without payment of just compensation would raise a substantial federal question. But that is not the kind of question before this Court. The question presented by the Petition involves Petitioner's failure to appeal an adverse trial judgment about the prior existence of some easements and her failure to meet the strict standards necessary to challenge the judgment by an equitable proceeding filed four years later. Thus, the question presented is not a substantial federal question which will invoke this Court's exercise of its certiorari jurisdiction. *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 23 S.Ct. 123, 47 L.Ed. 190 (1902); *Zucht v. King*, 260 U.S. 174, 43 S.Ct. 24, 67 L.Ed. 194 (1922).

CONCLUSION

The Writ of Certiorari should be denied by the Court in this case because:

(A) There are adequate and independent state grounds to support the decisions below; thus the constitutional issues need not be reached.

(B) Petitioner has not preserved the constitutional issues for review by perfecting appeal and raising issues in the state courts in a timely fashion that would allow the state courts to pass upon them.

(C) There is no conflict between the proceedings of the state courts and Petitioner's rights to federal due process. Petitioner has shown no denial of due process.

(D) The Writ of Certiorari should not issue merely to relitigate adverse fact findings below and in the first lawsuit, long since final and binding on Petitioner.

(E) No substantial federal question is presented for review.

(F) The Petition contains factual inaccuracies, in that it represents as undisputed or admitted a number of propositions that are vigorously disputed, were never admitted, and were the issues in the courts below and decided at odds with facts alleged by Petitioner as the basis of the case at bar.

WHEREFORE, PREMISES CONSIDERED, State Respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE

I do hereby certify that true copies of the foregoing brief have been served upon counsel for Petitioner and Respondents in accordance with the rules of this Court and the statutes of the United States on the 27th day of January, 1982, by depositing same in sealed envelopes properly addressed with postage prepaid in the U. S. Mail.